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No. 82-311

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM L. BUSKIRK,
Plaintiff-Respondent,

vs.

BURLINGTON NORTHERN INC., A Corporation,
Defendant-Petitioner.

REPLY TO PETITION FOR WRIT OF CERTIORARI FROM THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT, AND THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

Does the decision of the Appellate Court of Illinois, Fifth District, finding a violation of 45 USCA Sec. 2 (1907), commonly known as the "Safety Appliance Act", as a matter of law conflict with this Court's interpretation of the "Safety Appliance Act".

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OPINIONS BELOW

The opinion of the Fifth District Appellate Court of Illinois is reported at 103 Ill.A-p.3d 414,431 N.E.2d 410 (5th Dist. 1982). The opinion is set forth in the Petitioner's Appendix. The decision of the Illinois Supreme Court, denying the Petition for Leave to Appeal, dated May , 1982, has not been officially reported.

JURISDICTIONAL GROUNDS

The Illinois Supreme Court denied the defendant's Petition for Leave to Appeal on May 28, 1982. Such denial is a final judgment or decree as the judgment of the Fifth District Appellate Court of Illinois, reversing the verdict of the jury, was thereby affirmed. Petitioner brought its prayer for a Writ of Certiorari pursuant to 28 U.S.C. Sec. 1257(3) (1948) (amended 1970).

FEDERAL STATUTES INVOLVED

Respondent brought a two-count action under the Federal Employer's Liability Act (45 U.S.C.A. Sec. 51 (1970)) and the Safety Appliance Act (45 U.S.C.A. Sec. 2 (1970)), in the Circuit Court of Twentieth Judicial Circuit, St. Clair County, Illinois. After a jury verdict for the defendant on both counts, an appeal was taken by plaintiff to the Illinois Appellate Court, Fifth District, on Count II of plaintiff's Complaint, alleging a violation of 45 U.S.C. Sec. 2 (1970) only. The verdict in the trial court as to the count alleging a violation of 45 U.S.C.A. Sec. 51 was not appealed. Petitioner's Petition for Writ of Certiorari is in error when it states that the lower court's construction and application of "these" statutes is involved. The only Federal Statute involved is 45 U.S.C.A. Sec. 2, commonly known as the Safety Appliance Act, coupler section.

STATEMENT OF THE CASE

Defendant-petitioner's (hereinafter referred to as defendant), statement of the case is almost accurate as to the general circumstances of the accident, but it contains a large amount of irrelevant material. At the time he was seriously injured plaintiff-respondent (hereinafter referred to as plaintiff and/or Luke Buskirk), was attempting to push a misaligned draw bar of a coupler into proper alignment. During the trial of this case, two witnesses were presented having knowledge of the condition of the coupler at the time plaintiff was injured trying to align it, the plaintiff and Richard Golightly, a carman for the Burlington Northern. Plaintiff and Richard Golightly established the following undisputed facts:

> (1) that plaintiff sustained an injury during a coupling operation moving cars from the switch area to the outbound yard. (RW-22 - 23; T-133); (2) at the time plaintiff was injured he was attempting to align a draw bar on a

coupler that was misaligned preventing coupling by impact. (RW-27 - 29; T-142 - 143); (3) in order to align the misaligned draw bar on the coupler, plaintiff was required to go between two railroad cars. (RW-1 - 107 generally; T-142); (4) when plaintiff encountered the draw bar in question initially, it was shoved all the way to one side out of alignment. (RW-26, 27 - 30; T-132 - 135); (5) the draw bar on the coupler plaintiff attempted to align could not be moved by one man. (RW-27 - 29; T-133 - 134); (6) when the plaintiff was not able to move the draw bar in question, he had to seek the assistance of a carman, Richard Golightly, (RW-30 - 31; T-133); (7) the draw bar on the coupler that plaintiff was trying to align could be moved only by the use of a 4 x 4 timber pry bar approximately five feet long with two men applying pressure to the pry bar after Richard Golightly had oiled the carriage of the draw bar. (RW-31; T-134); (9) no evidence was produced that the draw bar on which plaintiff was injured was stressed beyond its manufactured limits. (T-137; testimony of William Buskirk generally) (10) the draw bar could not be moved prior to applying oil, but after applying oil, the draw bar moved. (T-14).

Testimony Of Eugene Thompson, Railroad Official

Mr. Thompson testified that he has been employed by the Burlington Northern Railroad for thirty-five years and was currently the yard master in Centralia, Illinois (T-327). On the date of the accident over which suit was brought, April 5, 1979, he was second shift yard master at East St. Louis, Illinois (T-328). Mr. Thompson's switch foremen was Luke Buskirk (T-328-329). At the time of the accident, Luke Buskirk was working the second shift switching cars pursuant to a list given to him by Mr. Thompson (T-331).

On the night of April 5, 1979 at approximately 8:30 p.m., Luke Buskirk called ahead for the assistance of a carman. (T-341) Mr. Buskirk told Mr. Thompson that he had a draw bar that would not move. (T-395) Mr. Thompson sent a carman to assist Luke. (T-341) The carman that was sent to help Luke Buskirk was Richard Golightly. (T-342)

According to Mr. Thompson, a switchman has a duty to try to align the knuckle before he calls for the help of a carman. (T-346) When Mr. Buskirk attempted to align the coupler he did what was expected. (T-346)

When couplers bypass, switchmen are to pull the cars back fifty feet, align the draw bars and open the knuckles. (T-350) At times a man must go between the cars to align the draw bars if they need aligning. (T-351) The cars will not couple on impact if the draw bars are not aligned. (T-351)

It is a switchman's duty to align the draw bars if they are not aligned. (T-352) A draw bar is supposed to be in a condition that it can be aligned manually. (T-352 - 353) When draw bars are not in alignment, ninety-five out of a hundred can be moved manually. (T-353) Draw bars are not designed to lock, but a draw bar will bind occasionally. The designer of the draw bar knew that draw bars would bypass and expected them to be able to move when they bypassed. (T-353) A draw bar should be able to be moved by a switchman doing his duty, i.e., align at a draw bar. (T-353)

REASONS FOR REFUSING THE WRIT

I.

A Coupler On A Railroad Car With A Draw Bar That Cannot Be Moved By A Switchman, That Is Stuck In A Mis-Aligned Position, That Is Mis-Aligned In A Manner To Prevent Automatic Coupling With Another Railroad Car On Impact, That Must Be Aligned Using A Timber Pry Bar And Oil, And That Failed To Couple On Impact, Violates Section 2, Title 45 Of The United States Code Commonly Known As The Safety Appliance Act As A Matter Of Law.

The decision of the Appellate Court of Illinois, Fifth District, is in complete agreement with Federal cases interpreting the Safety Appliance Act. Title 45, Section 2 of the United States Code states as follows:

> "It shall be unlawful for any common carrier engaged in interstate commerce by a railroad to haul or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The Safety Appliance Act as set out above has been interpreted by the United States Supreme Court and lower Federal Courts on numerous occasions. From the opinions interpreting the "Safety Appliance Act" numerous principles of law are clear. The duty imposed by the Act in general and by Section 2 of the Act, specifically, is an absolute duty. *O'Donnell* v. *Elgin, Joliet and E.R. Company,* 1949 338 US 384, 390-391, 94 L. Ed. 187, 192; *Southern Pacific Company* v. *Mahl,* (Fifth Circuit, 1969), 406 F 2d 1201, 1203. No degree of care of diligence on the part of defendant railroad will absolve a defendant from liability for injuries sustained as a result of the violation of the Act. *O'Donnell* v. *Elgin, Joliet and E. R. Company,* 1949 338 U.S. 384,

390-391, 94 L. Ed. 187, 192. To prove a violation of the "Safety Appliance Act" one need establish only that a coupler in question failed to operate efficiently. *Chicago, St. P. M. and O. R. Y. Co.* v. *Muldowney,* (Eighth Circuit. 1942), 130 F 2d, 971, 975; *Jenkins* v. *Chicago and Eastern Illinois Railroad Company,* First District, 1972, 5 Ill.App.3d 954, 960.

In support of plaintiff's position that the coupler in this case did not operate efficiently under the undisputed facts, plaintiff cites the case of *Kansas City Southern Railway Company* v. *Cagle,* (Tenth Circuit, 1955), 229 F. 2d 12. In this case, plaintiff, a switchman, rode on the lead side of a car that was to be coupled with another car, herein called the Rock Island car. 229 F 2d 12, 14. Upon approaching the Rock Island car, plaintiff saw the draw bar and the Rock Island car coupler were so far out of line to the West that the cars would not couple on impact. 299 Fed.2d 12, 14. The plaintiff signaled the engineer to stop the car upon which he was riding. He got off the car and attempted to align the draw bar of the Rock Island car. In attempting to align the draw bar of the Rock Island car the plaintiff injured his back. 229 F 2d, 12, 14. The Court in Kansas City Southern Railway Company was asked to decide the question of whether the mere fact the coupler was out of align was a violation of the Act (i.e., the "Safety Appliance Act"). The Court stated as follows at 229 Fed 2d 12, page 14;

> "Appellant states the question in its brief to be, 'Was this one fact that the coupler was out of line a non-compliance with the act?' We think the answer to this question must be in the affirmative."

The Court went on to state as follows at 229 F. 2d 12, page 14:

> "A great number of cases have considered the scope and effect of the coupler provision of Federal Safety Appliance Act. Space prevents even a listing of all the cases which have considered these provisions, let alone an analysis

thereof. Without exception they have held that the Act requires that cars be so equipped that they will couple automatically by impact and can be coupled and uncoupled without the necessity of persons going between them. Without exception the cases have held that operating a car in which the draw bar is so far out of line as to prevent automatic coupling violates the Act and imposes absolute liability. This principle of law was restated by the Supreme Court in the late case of *Affolder* v. *New York, C. and St. L. R. Co.*, 339 U. S. 96, 70 Supreme Court 509, 510, 94 L. Ed. 683, where the Court said again: 'We held that the plaintiff did not have to show a bad condition of the coupler; she was entitled to a preemptory instruction that to equip a car with a coupler which failed to perform properly in the switching operation was a violation of the act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care was to be considered on the question of liability'. Further, we said, 'a failure of equipment to perform as required by the "Safety Appliance Act" is in itself an actionable wrong...' Neither is the impact of this pronouncement weakened by the further statement in the opinion that if 'the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been opened properly,' the railroad had a good defense. In the first place that statement was not essential to the opinion and was, therefore, the nature dicta and, furthermore, it was said with respect to the consequences if the failure to couple resulted from a closed coupler and not from a draw bar so far out of alignment that automatic coupling would not even result if the coupler was operative."

Thus the Court determined that a misaligned draw bar in and of itself was a violation of the coupler act as a matter of law. The

Court stated that the plaintiff was entitled to a pre-emptory instruction on this issue. 229 F. 2d 12, 14 In the case at bar there is no dispute that the coupler in question was so far out of line when found by the plaintiff that coupling could not occur on impact. The only witnesses to the condition of the Coupler at the time plaintiff was injured testified that the coupling would not have occurred upon impact until the draw bar was realigned. Therefore, as in the *Kansas City Southern Railway Company* v. *Cagel* (10th Cir., 1955), 229, F. 2d 12, defendant herein violated the Safety Appliance Act as a matter of law.

The case of *Metcalfe* v. *Atchison, Topeka & Santa Fe Railway,* (10th Cir., 1974), 491, F. 2d 892, supports plaintiff's contentions on the case at bar. In Metcalfe a jury verdict in favor of the plaintiff was upheld. Plaintiff's decedent was killed as he walked between two cars to align a draw bar that was out of alignment to the extreme east. The Court found that evidence that the draw bar was out of alignment to the extreme east was sufficient to sustain the jury verdict under the Safety Appliance Act. 491 F. 2d 892, 897. In Metcalfe a coupling was never actually attempted, but the misalignment absent a coupling attempt was sufficient to sustain the jury's verdict as the Court found the evidence was sufficient to allow the jury to infer that the cars would not have coupled automatically upon impact. No evidence of a specific defect was presented and after the accident the coupler on the car was aligned and the coupling made. While in Metcalfe there was an issue of fact of whether the draw bar was out of line to the extent to prevent automatic coupling, in the case at bar it is an undisputed fact that the draw bar that plaintiff was aligning was out of line to the extent that automatic coupling would not have occurred. Thus, under the Metcalfe decision defendant violated Section 2, Title 45, of the United States Code as a matter of law.

Finally, in the case of *Chicago, St. P. M. and O. Company* v. *Muldowney,* 130 F. 2d 971, the complaint charged the violation

of the Safety Appliance Act by hauling and using on its line a car and tender not equipped with couplers coupling automatically by impact. The plaintiff's intestate had been killed when he was caught between the couplers. It was found "that the draw bars on the switching engine and car were out of alignment to such an extent that coupling could not be made without an adjustment of the draw bars." The Court stated, 130 F. 2d 971, as follows:

> "Ordinarily, where a draw bar is off center it will be straightened by taking hold of it with the hand and pulling it over to normal position. The coupling apparatus is so constructed as normally to have ply of 1-1/2 inches to either side, or an overall play of 3 inches. This play is necessary to permit cars when coupled together to pass around curves without danger of derailment or injury to the cars, and in order that cars may be coupled together on a curve. The coupling apparatus on the tender was so constructed as to permit a movement of the draw bar, within limits, from side to side, and because kept oiled it could be moved from side to side with little effort; that the draw bars on the Swift car and the switch engine were at and immediately prior to the time of the accident so far out of alignment that the coupling would not make automatically. . . It is not only the duty of the railroad to provide such couplers, but to keep them in such operative condition that they will always perform their functions. The test of compliance is the operating efficiency of the couplers with which the cars equipped."
>
> "In the final analysis the crucial question of fact in this case is whether at the time of the accident the couplers involved were in such condition that they would not couple automatically on impact. The evidence by which this ultimate fact is sought to be established is circumstantial . . . It is, therefore, important to determine whether there was

substantial evidence warranting a finding by the jury that the draw bars were out of alignment."

"...if this testimony was admissible, it was, we think when considered with all the intending facts and circumstances, sufficient to warrant the jury in finding that before the accident the draw bars were out of alignment to such an extent that a coupling could not be made automatically on impact."

"In view of the verdict of the jury, whose province it was to determine the question of proximate cause, the contention that the violation of the Safety Appliance Act was not the proximate cause of Muldowney's death need only be given passing notice. The condition of these couplers necessitated going between the ends of the cars. He may have been negligent in doing so, but that is not a defense. There was enough evidence to go to the jury upon the point that the draw bars were so far out of alignment that coupling could not be made by impact. As said by the Supreme Court in San Antonia & A. P. R. Co. v. Wagner, (1916) 241 U.S., 476, 36 Supreme Court 630, 60 L. Ed. 110, '... it clearly is a legislative intent to treat a violation of the Safety Appliance Act as "negligence" - what is sometimes called negligence per se.

'In various forms plaintiff in error raises the contention that it was plaintiff's improper management of the coupling operation that was the proximate cause of his injury. But any misconduct on his part was no more than contributory negligence, which, as already shown, is, by the employers' liability act, excluded from consideration in a case such as this.'

Affirmed by the U.S. Supreme Court, 317 U. S. 700; 87 L. Ed. 560.

Given the undisputed facts that the plaintiff was injured attempting to align a misaligned draw bar that precluded coupling by impact, the defendant, Burlington Northern, Inc. violated Section 3, Title 45 of the U. S. Code as a matter of law.

II.

The Decision Of The Appellate Court Of Illinois, Fifth District, Does Not Take Away Any Defense Alleged By Defendant To Have Been Given To The Railroads In The Affolder Case.

In the case at bar the proximate cause of plaintiff's injury was a misaligned drawbar. Plaintiff was injured as he attempted to affect the coupling by moving the drawbar into position. In Affolder v. New York, C.N.S.T.R. Company, (1949) 339 U.S. 96, 97 cars failed to couple, started to roll and the plaintiff was injured trying to catch them. In dicta at 339 U.S. 96, 99 the Affolder Court stated in theory that the railroad had defense to non-coupling if the couplers were not opened to operate when the coupling was attempted. In the case at bar the proximate cause has always been a misaligned drawbar that could not be moved manually, a condition that is an absolute violation of federal law and all prior federal decisions interpreting the application of Title 45, USCA Section 2. The Appellate Court of Illinois, Fifth District's Decision is in complete harmony with this Court's decision and the rest of federal system's decisions. The arguments how the drawbar became misaligned are attempts to argue assumption of risk and/or contributory negligence, both of which are not applicable to the case at bar and both of which are not defenses under the Safety Appliance Act. Title 45 USCA Section 53 and Title 45 USCA Section 7.

III.

The Decision Of The Appellate Court For The Fifth Circuit Of Illinois Does Not Reverse The Jury's Verdict Factual Determination.

On its face, the decision of the Fifth Appellate District of Illinois does not reverse the jury's finding of fact in this case. There was no dispute that Plaintiff was injured as a proximate result of attempting to align a misaligned draw bar that could not be manually aligned. The Fifth Appellate District of Illinois applied the case law to this undisputed fact correctly, holding, in effect, that whether the knuckle on the misaligned draw bar was open or closed at the time of the injury is irrelevant. Therefore, the decision of the Appellate Court for the Fifth District of Illinois follows the precedence of Federal case law.

IV

CONCLUSION

For the reasons set forth, the Respondent respectfully requests this Court to deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

§ 2 Automatic couplers

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Mar. 2, 1893, c. 196 § 2,27 Stat. 531.

§ 51 Liability Of Common Carriers By Railroad, In Interstate Or Foreign Commerce, For Injuries To Employees From Negligence; Definition Of Employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, afect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149 §1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

§ 53 Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

§ 7 Assumption of risk by employees

Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provision of sections 1 to 7 of this title shall not be deemed thereby to

have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Mar. 2, 1893, c. 196, § 8, 27 Stat. 532.